UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published October to June by the Law School of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $3.00 PER ANNUM, SINGLE COPIES, 35 CENTS

NOTES.

FORCIBLE ENTRY AND DETAINER.—The case of Schwinn v. Perkins [1] decides that a parol surrender of a lease executed by an actual possession constitutes a defense in an action of forcible entry and detainer. The consideration of a case of forcible enter must always involve two questions, what is forcible entry and what is possession.

Forcible entry and detainer is a remedy for the recovery of the possession of land. It was intended to prevent violence and a resort to force, and consequently for every entry upon land in actual possession with actual force it was a remedy to put the parties *in statu quo* without regard to the legal right either may have had in the land. It was regulated by statute in England at an early day, and most of the states have preserved the remedy. In view of disagreement among the cases as to just what constitutes forcible

[1] 78 Atl. 20 (1910).

entry and detainer it is difficult to formulate a comprehensive definition; it probably consists in violently taking or keeping possession of lands or tenements by means of threats, force, or arms and without authority of law.

Considered as a criminal action it is an essential element of the offense of forcible entry that at the time of the offense the premises shall be in the actual possession of him whose possession is charged to have been interfered with. To constitute actual possession it is not necessary that the party be personally present on the premises at the time of the offense if he is in actual exercise of authority and control over the same. The possession must also be peaceable as distinguished from a mere scrambling possession.[2] An actual peaceable possession, however, is all that is essential to maintain the action.[3]

It is immaterial whether or not such a possession is also rightful,[4] and it is not necessary that the prosecutor should have any legal title in the property. The action of forcible entry and detainer cannot be employed in either its civil or criminal form, to try the title or right to property.[4]

As a civil action, forcible entry and detainer is a remedy for the protection of the actual possession of realty, whether rightful or wrongful, against forcible invasion, its object being to prevent disturbances of the public peace, and to forbid any person righting himself by his own hand and by violence; and therefore ordinarily the only matters involved are the possession of the plaintiff and the use of force by the defendant. Except in instances where there is special statutory authority for adjudicating title, title is not involved and cannot be inquired into, and generally the right to possession as distinguished from the fact of actual possession is not in issue. The matter of right is foreign thereto,[5] and therefore, although one may have the title to realty and be justly entitled to the immediate possession thereof, yet if he enters by violence upon the actual possession of another who has no right or title whatever, he is liable to an action of forcible entry and detainer.[6] Even a trespasser may maintain this action against the owner himself.[7] This statement is denied by many cases and no doubt a mere trespasser can not maintain action; he must be a particular kind of a trespasser and have a particular kind of possession, the difficulty lies in drawing the line. The case of Emsley v. Bennett,[8] says that it is immaterial in what capacity or relation the plaintiff is in possession, whether as owner, tenant, agent or as a mere trespassor.

---

[2] Comm. v. Conway, 1 Brewst. (Pa.) 509.

[3] Swails v. State, 4 Ind. 516; People v. Leonard, 11 Johns (N. Y.) 504.

[4] Peele v. State, 161 Ind. 378.

[5] Sitton v. Sapp, 62 Mo. App. 197.

[6] Hamilton v. Adams, 15 Ala. 596; Judy v. Citizen, 101 Ind. 18; Emerson v. Sturgeon, 59 Mo. 404; R. R. v. Johnson, 119 N. S. 608; Emsley v. Bennett, 37 Iowa 15.

It is the *fact* of possession alone that is material. A person may render himself liable to an action for forcible entry and detainer by entering upon his own premises even when he has the right to immediate possession. Craig v. Donnelly,[7] approving Emsley v. Bennett, says, that however wrongfully a possession may be obtained, it cannot be intruded upon by force, and a trespasser may maintain the action, or an agent or servant may assert his possession to resist intrusion. It is the fact of possession alone that is material. One does not need to be a tenant to bring this action.

Hodgkins v. Price,[8] states that a bare possession without right, if unlawfully invaded by force, will be protected and restored, even against the owner or lessee of the premises who is legally entitled to possession, if the plaintiff was in actual possession at the time of the forcible ouster. But the action cannot be maintained on a mere scrambling or interrupted possession; the plaintiff's prior possession must have been actual, peaceable and exclusive. A mere trespasser upon land cannot maintain this action, although he may have been forcibly removed from the premises.

The rule is universal, therefore, that evidence to disprove the title of the complainant, in forcible entry and detainer, is irrelevant and unadmissable; title not being in issue.[9] But though it is immaterial what the rights of the parties are the plaintiff must establish his actual peaceable possession.[10] So forcible entry may be maintained where trespass may not, as, for instance, against the owner of the land, who may defend himself against an action of trespass by the plea of *liberum tenementum.* The owner of the land having a right of entry, will not commit a trespass by entering though with force, unless he also commits a breach of the peace. The law will not give damages against him in an action of *q. c. f.,* but will compel him to restore the possession in an action of forcible entry. The plaintiff in the action is not suing for damages, but to have the possession restored to him, and when he shows that he has been turned out of possession forcibly, or by one having no right to do so, he has made out his right to restitution, which cannot be defeated by any evidence in regard to the title or right of possession.

The vital question is always one of possession, and just what may or may not constitute possession seems impossible of exact determination, though certainly it requires less to fulfil the concepts of that term when this statute is involved, than in ordinary comprehension. A usual understanding of "possession" is the exercise of acts of dominion over the property in making the ordinary use and taking the ordinary profits of which it is susceptible

---

[7] 28 Mo. App. 342.
[8] 132 Mass. 196.
[9] Dutton v. Tracy, 4 Conn. 79.
[10] Olinger v. Sepherd, 12 Gratt. (Va.) 462.
[11] Words and Phrases.

in its present state; such acts to be so repeated as to show that they are done in the character of owner, and not as an occasional trespasser. Possession of lands means a foothold, an actual entry and possesson in fact, a standing upon it, an occupation of it. Bailey v. Bond [12] states that possession of real property implies something more than the mere right to enter upon and looks at, or occupy the same. Possession of real property implies the right to occupy and enjoy it. Possession is something more than mere right or title, whether to a present or future estate. It implies a present right to deal with the property at pleasure and to exclude other persons from meddling with it.[13] The possession of land is the holding of, and exclusive exercise of dominion over it. Webster defines "occupancy" as "possession"; possession, "actual seizing or occupancy." Bouvier defines occupancy as "the taking possession of those things corporeal," and says that "in order to complete a possession two things are required, (1) that there be an occupancy, and (2) that the taking be with intent to possess." There is no difference in the meaning of the words.[14]

Comm. v. Knarr [15] holds that a lessee, permitted to hold over after the expiration of his term, is in no sense a trespasser while he continues in possession, but on the contrary, he has a clear legal right to remain upon the demised premises until he is notified to quit. But if, when so notified, he refuses to leave and is ejected by force, he may not maintain action under the statute, *as his possession, such as it was, was only by permission.* This is a peculiar kind of possession, certainly enough to satisfy the statute in most jurisdictions, though not in Pennsylvania.

Browne v. Dawson [16] holds the rule that a mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands as possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession.

Tiffany [17] says that "where a landlord, upon the failure of a tenant to relinquish possession when his right thereto expires, has undertaken to resume possession by force, under the English statutes he is liable to an action for criminal prosecution, his right to possession being no justification for his disturbance of the public peace. And in many of the States the tenant can, in case of such forcible entry of the landlord, maintain an action to recover possession of the premises under the statutes of forcible entry and detainer, it being usually considered that one cannot defend such an

[12] 77 Fed. 406.
[13] Sullivan v. Sullivan, 66 N. Y. 37.
[14] Evans v. Foster, 79 Tex. 48.
[15] 135 Pa. 36.
[16] 12 A. & E. 624.
[17] Real Property, sec. 216.

action by showing that he was entitled to the possession which he thus forcibly took." The remedy of the statute is designed to restore the possession to him who has been turned out by force, as he held it before, until the right to possession can be adjudicated. A party in possession of land without right, however, and who has been turned out by the owner has no civil remedies except those provided by statute. But no one, not even the owner, has the right to forcibly take real estate from the possession of another, no matter how justly he may be entitled to it, and even though the occupant's possession may be unlawful.[18]

A mere licensee cannot be deemed an occupant of real property in such a sense as to render a trespass upon his occupation, however violent, a forcible entry upon land.[19] Thus, where a party erected a barn on his lot and allowed his son to occupy and use the same in common with himself, for many years, without any rent or contract, and the son finally took exclusive possession thereof and kept the owner out, it was held, in an action of forcible entry and detainer by the father against the son for possession, that the plaintiff was entitled to recover, no right in the property or to its possession vesting in the son.[20]

A miner, mining on lots under mining rules, having a mere license to go upon and mine the land, has no sufficient possession to maintain forcible entry and detainer.[21] But Ellison, J., said, "We readily concede that a license could have such possession as would entitle him to this action when ousted by force. But a licensee who has no possession—whose license is merely to labor for the owner at certain compensation, is no more in possession than any other employee who goes daily on his employer's premises (keeping his tools there) to labor for him. If a trespasser moves into possession of the owner's house claiming possession adverse to the owner, and the owner forcibly dispossess him, the trespasser may maintain this action. But suppose the trespasser were a burglar who occupied only while he stole, his claim to possession would be a sham and he could not maintain this action against the owner. Similarly if the owner returns home and finds himself barred out by his domestic servant, but if a possession has in reality been set up, with intention of use and occupancy, and the owner forces it, the servant could have the action." Also a mere tenant at will may maintain the action.[22]

We therefore find that though all jurisdictions require possession to have been in the plaintiff, that there is a difference of opinion as to what constitutes the particular kind of possession necessary, running all the way from possession through color of

[18] Phelps v. Randolph, 147 Ill. 335.
[19] McHose v. Ins. Co., 4 Mo. App. 514.
[20] Dunstedter v. Dunstedter, 77 Ill. 580.
[21] Rochester v. Mining Co. 89 Mo. App. 680.
[22] House v. Camp, 32 Ala. 541.

title, possession founded on bona fide though mistaken belief of right, and a holding over from a former legal possession, to mere intent to claim possession, rightfully or wrongfully and an actual occupancy of some duration.

Swayze, J., in Schwerin v. Perkins,[23] discusses the subject of forcible entry very fully, coming to an intermediate, and, we submit a preferable rule. "A mere trespasser may be forcibly ejected if no more force than is necessary for the purpose is used; it is only when a trespasser has ceased to be a mere trspasser and his occupancy has ripened into a possession, although it may be a wrongful possession only, that the statute relating to forcible entry and detainer becomes applicable. A mere trespasser does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner."

T. W. B., 3rd.

REPRESENTATIVE SUITS.—At common law suits for individual relief must, in general, be brought in individual actions. This rule was modified both in the law courts and chancery, to the extent of allowing parties in some cases, to join and to sue or be sued in one action. But here also all the parties interested were before the court. Soon cases arose in chancery, where the parties were so numerous, that you could never "come at justice," if everybody interested had to be made a party. In such case one party was allowed to sue or be sued on behalf of the others. This was originally a rule of convenience[1] and is the origin of the present representative suits. The practice was, at that time, as stated by Lord MacNaghten,[2] "given a common interest and a common grievance, a representative suit was in order, if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

In England, the Supreme Court Rules, following the Judicature Act of 1873, which codified the existing practice, made provision for this situation in Order XVI, Rule 9: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, * * * on behalf or for the benefit of all persons so interested." The first decision interpreting this rule restricted its application to "persons claiming some beneficial proprietary right, which they were asserting or defending in the cause or matter.[3] And so a suit in tort against a trade union, naming the officers of the union as representative defendants, for maliciously enticing away the plaintiff's employees,

---

[23] *Supra.*

[1] For examples of the application of this rule, see Darnell's Chancery Practice, pp. 196-197, and cases cited in notes.

[2] Duke of Bedford v. Ellis, 1901 A. C. 1.

[3] Temperton v. Russel (1893), 1 Q. B. 435.

was disallowed under this rule. This exact decision was later in express terms overruled,[4] and in the case of "Duke of Bedford v. Ellis" [5] the present interpretation of the rule is laid down. The rule, it was here said, was meant to apply the practice of the Court of Chancery to all the decisions of the High Court and was not therefore meant to restrict the then existing practice of granting representative suits in the Chancery Courts. In this case certain growers of vegetables sued in behalf of all other growers in the same class to enforce certain preferential rights to stands in the market, which rights, they alleged, were given to that class by Act of Parliament, and which had been violated by the Duke of Bedford. They also prayed for an injunction. The representative suit was allowed, although it was admitted there was no proprietary right in question. The "same interest," common to all the plaintiffs, was held to be the rights, accruing to them under the Act, and just what they were, and whether the Duke had violated them or not, raised the same questions of law and fact. The objection that the plaintiffs claimed damages for the invasion of their rights and that these sums varied according to the individual was held to be of no weight, for "in considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members.

Such is the modern English rule on representative suits. In a very recent case,[6] the rule is admitted but its application to the facts, it would seem, has seriously restricted the allowance of these suits. The plaintiff shipped goods on a vessel of the defendant company for a voyage from the United States to Japan during the Russo-Japanese war. The vessel was sunk by a Russian cruiser on the ground that she carried contraband goods. Plaintiffs sued defendants 'on behalf of themselves and others, owners of cargo lately laden on board." The defendant objected to the representative character of the suit. The Court by a vote of two to one sustained the objection and denied the suit so far as it was a representative action. The ground of the decision is that, though the plaintiffs had a common grievance against the defendant, yet no common right existed. Each shipper had made a separate contract, similar but not necessarily identical with those of the other shipper. All sorts of defences might defeat the rights of individual shippers, and so the case of each one had to stand on its own merits. In short "it is impossible to say that mere identity of form of a contract or similarity in the circumstances, under which it has to be performed satisfies the language of rule 9." No common statutory right existed here as in the case of Duke of Bedford v. Ellis. Also this is a mere action in tort for damages,

[4] Taff Vale Ry. Co. v. Amalgamated Society, 1901 A. C. 426.

[5] 1901 A. C. 1.

[6] Markt & Co., Limited, v. The Knight Steamship Co., Limited, 103 Law Times Rep. 369 (Nov. 12, 1910).

which, being wholly personal to the particular plaintiff, can never be the basis of a representative suit.

Buckley, L. J., in a strong dissent held that the plaintiffs had a common right not to have the defendant carry contraband goods, which he may or may not have violated in this case, and which question was one of common interest sufficient to sustain a representative suit. "On the question of whether the owners of the 'Knight Commander' committed a breach of contract or duty in shipping on the vessel goods, which were contraband of war, all shippers of goods, which were not contraband of war have the same interest. It is not accurate to say they have a similar interest. They have exactly the same interest, although it will result in the case of each of them in a different measure of relief." The question of damages is, as in the Ellis case, subsidiary to the determination of the main question at issue. Consequently a declaration should be allowed as to whether defendant was liable for shipping contraband goods, and if so, then the question of specific damages might be determined in this or another action.

It would seem that the dissenting position is the stronger, as it is very difficult to see any material point of distinction between this and the Ellis case. If in that case there was a common statutory right accruing to the plaintiffs, here they possess a common contractual right, *i. e.*, for the defendant not to carry contraband goods. The fact that this right accrued to each plaintiff by a separate, individual contract should not affect the situation. This right was the same to all the plaintiffs and arose immediately on the execution of the contract, from the nature of the contract itself, and not from any express provisions therein. Whether the defendant violated this right or not, certainly seems a question of "common interest." The fact that the various contracts of the plaintiffs might not be identical would come directly under Lord MacNaghten's observation in the Ellis case, that in considering representative suits, what is common to the class as against the defendants is the main point and not the points of difference as to the plaintiffs *inter se.* In the Ellis case an injunction was asked for and there was no such prayer here. This no doubt had considerable influence on the decision, as a representative suit for damages merely is apparently an unheard of action. in England. The decision, however, in no way impugns the rule laid down in the Duke of Bedford v. Ellis and can be considered an authority only on its exact facts.

In America the question of representative suits varies with the jurisdiction. In the absence of code regulations or other specific provisions on this point these suits are only permissible in Courts of Chancery under about the same regulations as exacted in England prior to the rules.[7] In these States our principal case

[7] For a history of the growth of this doctrine in our Courts of Chancery, see Platt v. Colvin, 50 Ohio State 703 (1893); Scott v. Donald, 165 U. S. 107 (1896); McKenzie v. L'Amoreux, 11 Barb. (N. Y.) 516 (1851); Pomeroy's Equity Jurisprudence, see 269, *et seq.*

could not arise, since, being a mere claim for damages for breach of contract, equity would have no jurisdiction. But in the Code States it could arise, as it has been repeatedly held, that this provision in the code applies to both legal and equitable actions.[8] This provision is practically the same in the various codes,[9] *i. e.*, "When the question is of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the Court, one or more may sue for the benefit of all." This provides two distinct grounds for representative suits, (1) common interest and (2) numbers. In most cases both elements are present. But it has been held, where there was a common interest, three plaintiffs were sufficient to make it a "common interest of many persons" and so within the above rule.[10] The cases in America, closest to the one under review, seem to be those in which a riparian land owner sues on behalf of himself and other land owners for an infringement of their riparian rights.[11] Here the representative suit is allowed, although the claim is for damages and though various defences may be set up by the defendant against the various land owners. But in all these cases the damages were incidental to an injunction, and it is difficult to say whether a court would ever allow a representative suit for a pure claim in damages.[12]

IMPLICATION OF CROSS LIMITATIONS FROM A GIFT OVER.—The implication of cross limitation from a gift over was an early rule used by the Courts to construe the intention of the testator. It was used to prevent a partial intestacy; for it was argued, that since the testator had gone to the trouble to make a will, this showed that he did not wish to die intestate, and so wherever possible, the courts would endeavor to follow out this intention of the testator. The early case of Scott v. Bargeman[1] established this principal of law in England. In this case there was a gift of £900 to trustees to divide equally among the three daughters of the testator at their respective ages of twenty-one. Provided if all three daughters should die before their legacies became payable, then the mother should receive the whole £900. Two of the daughters died before reaching twenty-one, and the remaining

---

[8] Platt v. Colvin, *supra;* Day v. Buckingham, 87 Wis. 215 (1894).

[9] As to various code provisions, see Pomeroy Remedial Rights, section 589, note 1.

[10] Hilton Bridge Co. v. Foster, 26 Misc. (N. Y.) 338 (1899).

[11] Climax Specialty Co. v. Seneca Button Co., 54 Misc. (N. Y.) 152 (1907); Cloyes v. Middlebury Electric Co., 11 L. R. A. (N. S.) 693 (1907) Vt.

[12] Cf. Whaley v. Commonwealth, 110 Ky. 154 (1901), suit by taxpayer on behalf of himself and others to recover illegal taxes collected. Amount sued for varied as to the different plaintiffs, but was liquidated.

[1] 2 P. Wm. 68.

daughter claimed the whole £900. It was held that the share of each daughter did not vest absolutely in any of the three daughters under age, so as to go, according to the statute of distributions, to their representatives and consequently the whole £900 belonged to the surviving daughter.

The case of Armstrong v. Eldridge[2] was a case of almost similar facts. In this case the gift over was to take effect upon the death of the survivor of the first class and did not depend upon a contingency. It was held that the context of the will showed that a joint tenancy was intended.

The case of Skey v. Barnes[3] was decided in England in 1816. The facts were almost identical with those of Scott v. Bargeman but the decision was diamentrically opposite. The reason for this was that in Skey v. Barnes it was held that the children, who were to take when they arrived at twenty-one, took vested remainders in fee, which were subject to be devested in the event that they all should die without issue. This case distinguished between real and personal property, and held that in the case of real property, if the limitation over is not to take effect till a failure of issue of all the devisees, an inference arises that the devisees are to take in succession by survivorship. But in respect to personal property, if a share once vests, though liable to be divested on a contingency, the question of survivorship never arises. If the contingency does not happen the share remains vested and passes to the representatives.

The conflict between Skey v. Barnes and Scott v. Bargeman arises not in regard to the doctrine of implication of cross-limitations, but upon the question whether the devisees of the first class took absolute vested interests or contingent interests under the will. In Skey v. Barnes the children, who were to be paid their legacies at their respective ages of twenty-one, were considered to have taken vested remainders in fee subject to be divested on the happening of the named event. The result of this decision is that since the remainders are vested absolutely there will be no intestacy on the death of one of devisees, and consequently the necessity to imply cross-remainders in order to avoid intestacy does not arise.

Jarmon[4] thinks that Skey v. Barnes may be considered to have fixed the rule of law on this important doctrine of testamentary construction.

In the case of Draycott v. Wood,[5] decided in 1863, cross-limitations were implied, where personal property was bequeathed to tenants for life and upon the death of the survivor of them over

[2] 3 Bro. C. C. 215.
[3] 3 Mer. 335.
[4] Jannon on Wills, 5th American Edition, Vol. III, p. 373.
[5] 8 L. T. U. S. 304.

absolutely, on the ground that the presumed intention was that property should continue in mass, passing through the hands of the class to whom life interests were given, to the ultimate taker, as a whole.

There never has been any doubt that in England cross-limitations will be implied where there is a devise of real estate to a class for the lives of its members and the life of the survivor, with a remainder over in fee. Nor does it alter the case when the remainder is contingent upon the happening of certain events,[6] nor when the devise to the class is a devise in tail.[7]

The cases in the United States have followed the English rule and have implied cross-limitations in order to avoid a partial intestacy where there has been a gift over, for the same reason that this was the probable intention of the testator. In the case of Smith v. Usher,[8] a testator devised land to his two daughters for their natural lives and after their death to their lawful children forever, and if the two daughters died without children, the land should go to testator's grandson in fee. It was held that each daughter's interest was a life interest and terminated with her death, and that an implication of cross remainders is necessary in order to prevent a "chasm in the limitations" and a consequent partial intestacy.

In Lillibridge v. Adie,[9] land was devised to two daughters in tail with a limitation over in case of failure of issue. Justice Story held that cross-remainders in tail were to be implied between the first devisees. This construction was in apparent accord with the intention of the testator, and stood confirmed by indisputable authorities.

The Massachusetts case, Allen v. Ashley,[10] under these same facts, implied cross-limitations.

The case of Fenby v. Johnson[11] is not in conflict with the other American decisions. This case directly follows Skey v. Barnes, the English case. In both cases the beneficiaries took absolute vested interests and consequently on the death of one there was no intestacy, but the deceased's share passed directly to his representatives. Fenby v. Johnson dealt with both real and personal property. Judge Krebs, whose decision was affirmed by the upper Court, said: "The rule that cross-remainders will be implied between devisees, from such words as these, is firmly established in cases where they take estates in tail; but a different rule has, after some conflict of authority, been adopted in cases in which they take estates in fee, with executory limitations over. Cross-re-

[6] Ashley v. Ashley, 6 Sim 358.
[7] Doe v. Webb, 1 Taunt 234.
[8] 108 Ga. 231.
[9] 1 Mason 224 (U. S.).
[10] 102 Mass. 262.
[11] 21 Md. 106.

mainders are implied amongst tenants in tail to prevent a chasm in the limitations. But in cases of limitations in fee of real estate, or of an absolute estate, in personal property, as in the case here, the gift vesting in the persons to whom the testator has given his whole estate in the property, upon their death it will vest in their legal representatives, and thus a chasm cannot occur, while the ultimate devise is awaiting the contingency upon which it is to be granted.

The cases in Pennsylvania have followed the English rule and have implied cross limitations in similar cases. In the case of Lentz v. Lentz,[12] a testatrix devised a house to her two daughters, A. and B., so long as they should remain single, and directed that it should be sold on their death or marriage, and the proceeds be divided among others. It was held that the intent of the testatrix was that upon the death of one, her share was to vest in the other.

Where there was a devise of land and cattle to three children for their lives and upon the death of the survivor of them over to certain other persons, the Court held that there were cross-remainders for life to the survivors and survivor by implication. It will be noticed that this decision applied both to real and to personal property.[13]

Pierce v. Hakes[19] implied cross-remainders between a class of devisees who had taken vested estates in tail. The cross-remainders were remainders in tail. This decision is considered a leading case in Pennsylvania. The part of the opinion which treats of cross-remainders was delivered by a lower court, but this opinion was affirmed on the appeal by the Supreme Court.

In Kerr v. Vemes,[14] there was a devise to two daughters of a house and furniture together with twenty acres of land for life and at their death to have the privilege of willing it at their death. The Court said: "The whole tenor and scope of their will shows in the clearest manner it was the express intent of the testator to confer an estate upon C. and P. for their joint lives in such wise, that the share of one first deceased should enure on her death for the benefit of the survivor.

The Pennsylvania Company's Appeal[15] is no more in conflict with the other Pennsylvania decisions than Skey v. Barnes is with the other English decisions. Both these decisions are the same and for the same reason. In the Pennsylvania case the testator gave absolute interests to several as tenants in common with a gift over upon the death of all without leaving issue. As the gift was absolute, on the death of one member of the class no intestacy occurred and there is no reason for implying cross-remainders. In

[12] 2 Phila. 148.
[13] Turner v. Fowler, 10 Watts 325.
[19] 23 Pa. 231.
[14] 66 Pa. 326.
[15] 106 Pa. 489.

this case the general rule is referred to but it is stated that this case differed because the interests were absolute and vested.

In Jones v. Cable[16] and McCallum's Estate,[17] which latter case was decided in 1905, it was held that the survivor of the life tenants took the interest of the deceased member of the class.

From these cases it can hardly be doubted that an established rule of construction has grown up which implies cross remainders among members of a class in all cases, except where the members of the class take an absolute vested interest in personal property or a vested estate in fee simple in real property. This rule was well established in England and the United States, and seemed to be equally well established in Pennsylvania. The law was in this condition at the time the case of Grothe's Estate[18] came before the Supreme Court of Pennsylvania. In this case the testator bequeathed one-third of the income of a trust estate to his widow for life or until she married, one-third to his son for life, and the remaining third to his grandson for life. In the event that the widow should remarry, her third was to go equally to the son and grandson. On the death of all three, the corpus of the fund was to go to the children of the grandson or their issue. The widow died and her third of the interest was divided equally between the son and the grandson. The son died, and the grandson claimed that the whole of the interest should be paid to him. The Court said: "It is true the reasonable presumption is that when the will was executed the testator did not intend to die intestate as to any part of his property. * * * While it is a presumption that the testator intended to dispose of his whole estate, there is a like presumption of equal force that the heir is never to be disinherited except by plain words or necessary implication." The Court went on to say that unless there is a clear implication that cross-limitations were intended by the testator the fund cannot be taken from the heir. The testator did not dispose of the interest after the life estate of each expired, and there is no reason that he intended the survivor to take the whole income until the distribution of the corpus, unless the presumptive intention to avoid intestacy should disclose such purpose. This, however, is not a sufficient reason for implying a gift or a cross limitation.

It seems to have made very little impression on this Court that the "presumptive intention to avoid intestacy" had been considered sufficient for courts in England, the United States, and Pennsylvania to imply cross-limitations in so many cases that it may fairly be said, that the rule had been thoroughly established that cross limitations would be implied. The Supreme Court does not pause to explain away any of these cases. It overthrows the well established rule of construction by raising the presumption

[16] 114 Pa. 586.
[17] 211 Pa. 205.
[18] 229 Pa. 186 (1910).

that the heir is not to be disinherited except by plain words, a presumption which had never been referred to in any of the cases that had risen under similar facts. The Court did not refer to the rule as it had been decided, by the Pennsylvania decisions, but, apparently closing its eyes to all precedent cases, decided the case as if it had been *res nova*.

G. H. C.

INJUNCTION—STRIKE FOR CLOSED SHOP.—The problem of the use of the injunction in cases generally classified as cases of strikes and boycotts has been treated in most jurisdictions as a problem of equity jurisdiction over TORTS. If equity is to consider taking jurisdiction over a tort it must, of necessity, be satisfied that the facts alleged in the bill make out a tort threatened or continued by the respondent. This was the first battle ground of the law in cases of this character and the conflict ended in nearly complete overthrow of the doctrine of absolute rights. From earliest times the right of a man to engage in business, to have labor or custom flow freely to him was recognized as a right of which an infringement by violence or threat was ground for an action on the case.[1] Whether the subsequent recognition of this right as a property right which equity would protect was an extension of the limits of what the law calls property, or a virtual abrogation of the maxim that "equity protects only property" is immaterial. It is sufficient that the right was well established as a property right when the first cases of boycott by economic pressure arose. The question presented in these cases was one of some nicety for in their pure form the infringement of the plaintiff's right freely to deal is occasioned by the exercise of the same right in the defendant. In the typical case where A refuses to deal with B if B deals with C, before the decision of Walker and Cronin,[2] the American cases took the position that C's right to deal or refuse to deal being an absolute right he was not liable for any injury resulting from the exercise of that right;[3] and even later, in England, the theory of absolute rights prevailed.[4] The statement of law found in Walker and Cronin[5] is an expression of the theory which is the foundation of the doctrine of relative rights. "Any act the natural result of which is an injury to a particular person, knowingly done by one person, and resulting in injury to the other, renders the

---

[1] Garrett v. Taylor, Croke James Rep. 567 (1620); Tarleton v. McGawley, 1 Peake, 205 (1793).

[2] 107 Mass. 555 (1871).

[3] Orr v. Ins. Co., 12 La. Ann. 255 (1857); Bowen v. Matheson, 96 Mass. 499 (1867).

[4] Allen v. Flood, A. C. 1 (1898); Huttley v. Simmons (1895), 67 L. J. O. B. 213. But see Quinn v. Teatham (1901), A. C. 495.

[5] 107 Mass. 555 (1871).

actor liable to the injured person, unless the actor has a just cause and excuse." It is unfortunate that the courts in applying this doctrine to trade and labor cases have seen fit to re-state it and lay down the proposition that a purely malicious motive can in these cases make an act otherwise legal, illegal. It will be seen that the propositions are essentially the same and it must be considered unfortunate that the presentation favored by the courts, makes motive the determining element in the question of the defendant's civil liability.

While it is true that the generally accepted authority now is that a refusal to deal, either with malice, or without justification, is a tort to the person necessarily injured thereby,[6] there are many cases to be found which appear in conflict.[7] The writer submits that these apparent conflicts are due not to conflicting theories of the law but to the different economic aspects of the cases. Thus a court finds it impossible to see a justification for a refusal to deal by a labor union boycotting capital[6] and yet can find lawful justification for the defendant in similar cases where the parties are reversed.[7]

If, in a given case it be established that the acts are a tort the question of equity jurisdiction is comparatively simple. On account of uncertain or irreparable damages the remedy at law is always inadequate and the injunction will issue unless it is prevented by one of the fundamental limitations of equitable remedy. The limitations which most frequently make the injunction impossible in these cases are that equity will not order one man to do personal service for another; and that equity will not prohibit free speech (*i. e.,* the free expression of *ideas*).

In the recent New York case of Schwartz v. International Ladies' Garment Workers' Union, *et al.,*[8] a federation of trade unions struck in all the shops of the members of a manufacturers' association for the purpose of obtaining from the employers, members of this association, an agreement for closed shops. Some physical injury to the employers' property was shown and many acts of violence to employees who refused to quit work. The association of employers filed a bill in equity and secured an injunction against all violence and apparently against even peaceful picketing on the ground that it was in aid of an unlawful object. A study of the opinions in this case and of the cases cited leads to the conclusion that the courts of New York determine the question of the legality of strikes for a closed shop on a theory peculiar to that jurisdiction. Under the general law discussed above the facts would have made out a tort to any non-union laborer who lost employment because of the strike, or a tort to the employers in that the respondents by violence interfered with their

[6] Moores v. Bricklayers' Union, 23 Ohio Weekly Law Bulletin, 48 (1899).
[7] Raycroft v. Taynor, 68 Vt. 219 (1896).
[8] 124 N. Y. S. 968.

right to have labor flow freely to them. As the bill was brought by the employers of course the Court could not consider the case in its aspect of a tort to non-union workmen, but it did not even in the strict sense consider it as a tort to the employers. The case seems to have gone on the ground that an agreement between substantially all the employers in the borough and the respondent union to employ none but union men would have been against public policy and illegal because it would have forced all workmen of a certain class to join the union or lose their chance of employment. This being true the acts of the respondent union in trying to force the complainants into such a contract were acts to accomplish an illegal object and therefore a common law civil conspiracy, and illegal.

It would appear that this theory has been at least one of the grounds for the decision of all the cases of this class in New York. In Curren v. Galen[9] there was threat of strike and an action for damages by a discharged non-union employee. The defence was a contract with an employers' association for the employment of only union labor. The association included practically all the employers of that class of labor in the city and the plaintiff recovered on the ground that the contract, being illegal, was no defence. If it were not for the subsequent cases it might be argued that the conclusion in this case was reached by the same reasoning which would have led to it in other jurisdictions. One paragraph in the opinion, however, and its subsequent interpretation and application by the court leads to the other conclusion. "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper, or to restrict that freedom, and through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position and of deprivation of their employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges."

National Protective Association v. Cumming[10] was a case of a threat to strike by the defendant union causing discharge of the members of the plaintiff's union. There was no contract between the defendant union and the employer and only one place of employment was concerned and the plaintiffs failed to recover damages. Parker, P. J., places his decision on two grounds: First, "that the defendants had a right to strike for

[9] 152 N. Y. 33 (1897).
[10] 170 N. Y. 315 (1902).

any reason they deemed a just one, and further had a right to notify their employer of their purpose to strike"; and second, "even if it be admitted that motive could affect the legality of their acts, the motive here was justifiable and not malicious." Vann, J., in a dissenting opinion argues for the adoption of the rule general in other jurisdictions which would permit recovery here.

The Court of Appeals in Jacobs v. Cohen [11] held legal a contract between a single employer and a union for a closed shop, while only three years later the same Court affirmed the Supreme Court's decision in McCord v. Thompson-Stanets Co., which held an agreement by a borough-wide association of employers to employ only carpenters who were members of a certain union, illegal and void. Scott, J.: "This (the illegality of the agreement) seems to be established by the opinion of the Court of Appeals in Curren v. Galen, *supra,* re-affirmed and explained by Jacobs v. Cohen, *supra.* In the latter case Judge Gray, writing for the court, makes it quite clear that while an individual employer may lawfully agree with a labor union to employ only its members, because such agreement is not of an oppressive nature operating generally throughout the community to prevent craftsmen in the trade from obtaining employment and earning their livelihood, yet such an agreement when participated in by all or by a large proportion of employers in any community becomes oppressive and contrary to public policy, because it operates generally upon the craftsmen in the trade, and imposes on them as a penalty for refusing to join the favored union, the practical impossibility of obtaining employment at their trade and thereby gaining a livelihood."

The New York doctrine would seem then to be, that while the right to refuse to deal is not an absolute right its exercise is more readily justified than under the general rule, but that its use for the purpose of forcing all workmen in a given community to join a union or be deprived of the chance of employment is illegal on grounds of public policy. In view of the decision in National Protective Association v. Cumming (*supra*) and of the interpretation of Curren v. Galen (*supra*), in McCord v. Thompson-Stanett Co. (*supra*) it is submitted that a refusal to deal with the purely malicious motive to injure another could not, consistently with the decided cases, be held illegal unless the scheme was borough-wide. It would also appear that when such a scheme is borough-wide it will be restrained at the petition of any person who would be injured by its success.

The case is more interesting in what it suggests than in what it actually decides. It would seem hard to defend the proposition that the fact that the respondents conspired to force the complainants to make the illegal contract with them made acts a tort which would not have been a tort in the absence of such conspiracy. There are, however, cases which seem rather to assume this proposi-

[11] 183 N. Y. 207 (1905).

tion than to lay it down.[12] As to the injunction the words of the Court are ambiguous and it is impossible to tell whether or not peaceful picketing was retrained because in aid of an illegal object. Under these circumstances such picketing would undoubtedly be a tort, but it would seem equity could never restrain it owing to the constitutional provisions in regard to free speech. Cases can, however, be found where the order issued by the Court does seem to restrain peaceful argument,[13] but it cannot be said that this view has made any permanent place for itself in the law.

F. L. B.

[12] Blindell v. Hagan, 54 Fed. 40, 1893; affirmed in Hagan v. Blindell, 56 Fed. 696, C. C. A. 1893; Elder v. Whitesides, 72 Fed. 724, 1895; City v. Produce Exchange, 48 L. R. A. 90 (1900).

[13] Knudsen v. Benn, 123 Fed. 636 (1903).